No. 9401.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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P. M. JACKSON, Trustee in Bankruptcy for the Estate of Leonard J. Woodruff, a Bankrupt,

Appellant,

vs.

E. A. LYNCH, Receiver in Bankruptcy of the Estate of Leonard J. Woodruff, Alleged Bankrupt,

Appellee.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Circuit Court of Appeals of the United States in and for the Ninth Circuit:

Comes now P. M. Jackson, trustee in bankruptcy for the estate of Leonard J. Woodruff, a bankrupt, appellant, and herewith petitions the above-entitled Court for a rehearing herein upon the following grounds:

I.

The opinion of this Court fails to give full faith and credit to a final judgment of the District Court of Oklahoma.

II.

The opinion of this Court is in conflict with and violates the spirit and letter of the United States Supreme Court's General Order No. 6.

III.

The opinion of this Court is in conflict with and violates the spirit and letter of the United States Supreme Court's General Order No. 51.

IV.

The opinion of this Court is erroneous in holding that the District Court of California had primary jurisdiction after the entry of the order of adjudication by the District Court of Oklahoma.

V.

The opinion of this Court in defining "Jurisdiction" fails to state to what time concurrent primary jurisdiction exists or when it is exhausted as between the District Court of Oklahoma and the District Court of California.

VI.

The opinion of this Court is erroneous in holding that the District Court of California continued to have primary jurisdiction after a court of concurrent jurisdiction had proceeded to final judgment.

VII.

The opinion of this Court is erroneous in applying the principle in the case of *Jones v. Springer,* 226 U. S. 148.

VIII.

The opinion of this Court is erroneous in assuming that the action of the District Court of California (in conflict with the District Court of Oklahoma) was proper by reason of a lack of a custodian of the bankrupt's property, where the Bankruptcy Act provides ample powers by ancillary proceedings in aid of the court of original jurisdiction.

IX.

The opinion of this Court is erroneous in holding that applying to the District Court of California for an order to turn over the property in California to appellant was the exercise of ancillary jurisdiction in bankruptcy.

Introduction.

Appellant feels that the decision of this Court on which a rehearing is requested is contrary to the settled principle of the Bankruptcy Act pertaining to jurisdiction of courts of bankruptcy, and will encourage in the future needless receiverships, and will duplicate proceedings in bankruptcy and the administration of estates and, in the public interest, the decision of this Court should be changed in harmony with the decisions of this Court and the Supreme Court.

According to our understanding of the law the decision in the instant case violates the following principles of law:

(1) That where two courts have concurrent jurisdiction, and the first of said courts proceeds to judgment,

the other court must give full faith and credit to the previous judgment, and nothing is left, over which the second court can exercise jurisdiction.

(2) That no proceedings in another district can be instituted except as provided by Section 69, Subdivision C, and Section 2-A, Subdivision 20, of the Bankruptcy Act (11 U. S. C. A., par. 11, Subdivision 20), and General Order No. 51, and the Act requires them to be in aid of the primary court, and not in conflict therewith.

(3) That a motion or suggestion to a court lacking jurisdiction cannot confer jurisdiction, or make the proceedings ancillary, but is a judicial courtesy which should first be resorted to, as suggested by the Supreme Court in *Gross v. Irving Trust Co.,* 289 U. S. 342, 345.

(4) The Court's decision leaves an uncertainty as to whether the proceedings in the District Court of California are ancillary or whether it is a primary proceeding (it cannot be both), which will lead to further confusion and litigation in respect to fees, ownership and control of property, as well as other matters.

We submit the following argument in support of this petition for rehearing.

ARGUMENT.

Failure to Give Full Faith and Credit to a Final Judgment.

No appeal having been taken from the order of adjudication entered by the Oklahoma District Court, said order became a judgment *in rem* against all creditors and other parties in interest, and removed the title to the bankrupt's property to the custody of the District Court of Oklahoma.

Gross v. Irving Trust Co., 289 U. S. 342, 344.

The rule is tersely stated in *Gilbert's Collier on Bankruptcy*, 4th Edition, page 417, as follows:

> "An adjudication acts both *in personam* and *in rem*. The property of the bankrupt at once vests in the trustee subsequently to being appointed; remaining meanwhile *in custodia legis*. All persons named in the schedules as creditors are parties and affected thereby." Citing *Robertson v. Howard*, 229 U. S. 254.

We submit that to give full faith and credit to said judgment of adjudication no other court could thereafter enter another judgment of adjudication attempting to pass title to the bankrupt's assets at a different date to a possible different trustee. Such a construction leads to confusion and, we submit, is not the law.

We feel that the decision of this Court is erroneous in not distinguishing between the jurisdiction of courts of bankruptcy, first, to enter an order of adjudication; second, to administer assets and distribute the same to creditors; third, to entertain ancillary proceedings; and fourth, to entertain suits to recover preferences, etc., authorized under Section 70, Subdivision 3, of the Act.

Appellant does not dispute the fact that proceedings might be instituted in a number of District Courts in connection with the prosecution for crimes; entertaining plenary actions; in fact, Section 2 of the Bankruptcy Act, Title 11, Section 11, U. S. C. A., specifies some twenty-one subdivisions under which courts of bankruptcy have jurisdiction, but to give said section the interpretation given by this Court would mean that said jurisdiction once existing should exist forever, in spite of a previous final judgment by one of the courts of concurrent jurisdiction. An example would be that, under Subdivision 4 of Section 2 of the Act, all District Courts have jurisdiction

> "to arraign, try and punish persons for violation of this Act in accordance with the laws of procedure of the United States now in force . . ."

It cannot be contended that if such a person were tried and punished in Oklahoma on a violation of the Bankruptcy Act, where concurrent jurisdiction was originally in the District Court of California, that after proceeding to judgment of conviction in Oklahoma, said person could be tried for the same offence by the District Court of California. Subdivision 8 of Section 2 of the Act provides:

> "close estates by approving the final accounts and discharging the trustees whenever it appears that the estate has been fully administered."

Certainly the District Court of California would have no jurisdiction to close the estate and discharge the trustee and end the bankruptcy proceeding in Oklahoma.

We submit that under the decision of this Court construing Subdivision 1 of Section 2, permitting a proceeding in the District Court of California after a final judgment in Oklahoma, would permit the California Court to enter a judgment of adjudication, appoint a trustee and proceed to confuse the administration of this estate, and approaches a far more absurd proposition than the two examples hereinabove stated.

We submit that this Court's decision should be changed wherein it recites:

> "until consolidation was ordered by the District Court for the Eastern District of Oklahoma, both of these courts had primary jurisdiction to entertain petitions in bankruptcy, appoint receivers and do whatever was necessary to preserve the bankrupt's property"

to read:

> "until the entry of the order of adjudication in the District Court of Oklahoma, the District Court in Califonia had concurrent jurisdiction with the District Court of Oklahoma to entertain voluntary or involuntary petitions to adjudge Leonard J. Woodruff a bankrupt, but after the Oklahoma Court, in exercise of its jurisdiction, had proceeded to final judgment, the District Court of California must give full faith and credit to said judgment, and its concurrent jurisdiction was thereupon exhausted to enter an order of adjudication or to entertain a petition for such an order, but said California Court then had jurisdiction only to entertain ancillary proceedings properly instituted under General Order No. 51 for the appointment of a receiver in aid of the Oklahoma Court."

The Opinion of This Court Violates the Spirit and, We Think, the Letter of General Order No. 6.

Attention is called to General Order No. 6 providing that, upon application being made, the Court first acquiring jurisdiction shall

> "determine the court in which the cases can proceed with the greatest convenience to parties in interest, and the proceedings upon the other petitions *shall be stayed by the courts in which such petitions have been filed until such determination is made.*" (Emphasis supplied.)

We think the spirit as well as the interpretation of this order means that no further steps should be taken to settle receiver's accounts or perform other duties by any court until the conflict between the respective courts has been determined, and then, no provision being made for further orders or proceedings in any other court, the order is mandatory that the other courts shall order the cases before them transferred to the court first acquiring jurisdiction.

Under the opinion of this Court this General Order can be made meaningless by allowing the other courts to proceed to enter orders for fixing fees, ordering the fees paid, ordering sales of assets, etc., and there is no end to where the confusion and proceedings may lead, while a reasonable interpretation of the General Order would mean that all other courts must immediately transfer the file and proceedings to the court first acquiring jurisdiction, so that said General Order and its useful purposes and objects can be accomplished.

May we inquire, what benefit is the injunctive provision "shall be stayed" if after the order is made under General Order No. 6 the "stay" is dissolved and the court enjoined is allowed to enter further orders?

The Opinion Violates the Spirit and Mandatory Provisions of General Order No. 51.

The next to the last paragraph of the decision by this Court is to the effect that the application by Jackson to the District Court of California for surrender of the property retroactively converted the proceedings in California into ancillary proceedings and was an exercise by the California Court of ancillary jurisdiction.

The Supreme Court, in *Gross v. Irving Trust Co.,* 289 U. S. 342, 344, has stated that this proceeding should be followed under a judicial courtesy owed by one court to another. The Court stated:

> "Nevertheless, due regard for comity — which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of *In re* Diamond's Estate, *supra,* pp. 72, 75. In the present case, however. such a course would probably have been futile, in view of the fixed attitude of the state courts on the subject."

This Court, in *Moore v. Scott,* 55 Fed. (2d) pages 863, 864, laid down the rule:

> "Nor can the bankruptcy court itself surrender this exclusive jurisdiction: '"Indeed, a court of bankruptcy itself is powerless to surrender its control

> of the administration of the estate." ' Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 739, 51 S. Ct. 270, 272, 75 L. Ed. 645."

If the court of primary jurisdiction could not waive or surrender its jurisdiction, it certainly would not, by practising the judicial courtesy suggested by the Supreme Court, create an ancillary proceeding in California and confer upon the California court the right to administer the bankrupt's assets. Furthermore, the Supreme Court, by its General Order No. 51, in mandatory language, provides:

> "No ancillary receiver shall be appointed in any district court of the United States in any bankruptcy proceeding pending in any other district of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of a judge of the court of original jurisdiction. . . ."

Since the proceedings filed in California were not claimed to be ancillary, nor did the lower court consider them ancillary proceedings, nor has anyone contended that General Order No. 51 has been met or complied with, we feel that the language used by this Court in the next to the last paragraph should be eliminated or changed in accordance with the rule announced by this Court in *Moore v. Scott, supra,* and in accordance with General Order No. 51.

In *United States Code Annotated,* 1939 Supplement, Title 11, Sections 1 to 31, there is a commentary on the Chandler Bill by George E. Q. Johnson, former United

States district judge and author of *Johnson's Bankruptcy Reorganizations.* Quoting from page 8, the author states the rule contended for by appellant:

> "In ancillary proceedings, however, the judge may appoint one or more ancillary receivers, and to prevent unseemly controversies between primary and ancillary receivers, and between the courts of primary and ancillary jurisdiction, the judge must appoint a primary receiver as an ancillary receiver, although he may appoint one or more co-ancillary receivers. This new provision prevents local creditors from controlling the ancillary proceedings antagonistically to the primary receivership and thus a unified administration free from expensive and delaying jurisdictional controversies is made possible."

Application of Babbit v. Dutcher.

This Court cites the case of *Babbit v. Dutcher,* 216 U. S. 102, and we desire to call attention in respect to the language of the Supreme Court in deciding the matter that the case arose by an ancillary proceeding instituted on the application of the receiver appointed by the court of primary jurisdiction, and we submit the language of the Court should be considered in construing that set of facts, together with the further fact that the statute and General Orders have since been amended by the amendment of 1910 to Section 2, Clause 20, of the Bankruptcy Act (see *Lazarus v. Prentice,* 234 U. S. 263, 267); also before the promulgation of our present General Orders Nos. 6 and 51, and before the enactment of the Chandler Act. The Court, in construing the powers of courts of bankruptcy, did not lay down the rule as to how those powers are invoked or when concurrent jurisdiction was exhausted.

The Court Erred in Applying the Case of Jones v. Springer.

This Court cites the case of *Jones v. Springer*, 226 U. S. 148, as an authority in support of the statement of this Court that

> "the District Court for the Southern District of California had power to do all that it did in this case when acting upon a petition in bankruptcy, notwithstanding a prior adjudication."

The distinguishing facts in *Jones v. Springer* from the question at bar are:

(1) The property was placed *in custodia legis* of the state court prior to bankruptcy;

(2) The property was perishable and it was necessary for a sale to be made to preserve the *res;*

(3 The claim of the trustee was transferred to the proceeds, which were merely substituted for the property;

(4) There was no attempt to reduce the amount of the *res* by fixing fees;

(5) The parties acted in good faith, without knowledge of the adjudication in bankruptcy;

(6) Transactions without knowledge of the bankruptcy are recognized as valid in the absence of fraud or lack of consideration under Section 21, Subdivision g of the Bankruptcy Act itself.

The language contained in the opinion of this Court in respect to *Jones v. Springer* violates the rule stated by this Court in *Moore v. Scott, supra,* wherein a department of the District Court appointed a receiver (and we assume an emergency existed justifying the appoint-

ment), and the District Court was in possession of the assets prior to the filing of the petition in bankruptcy, and the District Court made an order fixing fees and providing for their payment, which order this Court set aside upon principles suggested by appellant in briefs on file in this Court. The Court said:

> "To say that the judge of the court sitting in equity could protect the rights of all parties as well as could be done if he were sitting in bankruptcy is beside the question. Congress has provided for the administration of bankrupt's estates in the bankruptcy court; and after a bankruptcy has supervened, no other court has the power or authority partially to administer or to deplete the estate, by disposing of or impressing a lien upon it or upon any part thereof—valid prior liens, of course, excepted—not even in favor of its own receivers."
>
> *Moore v. Scott, supra.*

Lack of a Custodian in California Conferred No Jurisdiction.

The portion of this Court's decision based upon the theory that it was necessary for the District Court in California to take possession of property within this district in order to protect the same from loss, or that it might have been destroyed if left for a single day without a custodian, finds no support in the record, and appellant feels that the exposure of the property which was *in custodia legis* and which the world was on notice of by recordation of a copy of the order of adjudication in

California, on July 7th, 1939 [Tr. p. 17] Sections 44 and 75, Title 11, U. S. C. A., was not nearly so dangerous as the hazard to which the estate is now exposed by the petitions for some $17,500.00 in fees by the unjustifiable proceedings in California.

The creditors in California could easily have provided proper protection in the event of the danger of loss (1) by proceedings instituted under General Order No. 51, applying for an ancillary receiver with the consent of the District Court of Oklahoma; (2) by the levy of a writ of execution on the judgment of the petitioning creditor; (3) by applying, under Section 2, Subdivision 3 of the Bankruptcy Act, for the appointment of a custodian, United States marshal, or receiver, to the Court that had jurisdiction of the assets.

We feel that it is a dangerous doctrine to confer jurisdiction on courts beyond the statute and in violation of a General Order in Bankruptcy on the theory of an emergency and that, unless this portion of the decision is changed, abuses are sure to develop in the future, and an alleged emergency will be offered as an excuse for the failure to follow the law and General Orders in Bankruptcy, which will lead to confusion in the administration of bankruptcy estates. The procedure contended for by appellant is in harmony, we think, with Section 32 of the Bankruptcy Act (Section 55, Title 11, U. S. C. A.), as well as General Order No. 6.

Correction of Facts.

This Court states in the closing sentence of its opinion that the papers were transmitted by the District Court of California to the District Court of Oklahoma. An examination of the records made by counsel as of this date shows that no certified copies or documents have been transmitted as provided in General Order No. 6, and we respectfully submit that appellant is entitled to have the opinion corrected to show that said records have not been transmitted by reason of the restraining order appealed from by appellant herein.

Since this Court's opinion filed May 10th, 1940, the United States Circuit Court of Appeals for the Tenth Circuit has decided both of the appeals against the appellant's therein, so that the Order entered by the Oklahoma Court under General Order No. 6, as of October 16th, 1939 [Tr. pages 40 to 42 inclusive], has been held by the Circuit Court for the Tenth Circuit to be proper, and has also affirmed the District Court's order denying the motion of M. E. Heiser, the petitioning creditor in the above entitled proceedings, to dismiss the proceedings in Oklahoma. That said appeal is entitled *M. E. Heiser and George F. Fowler v. Leonard J. Woodruff, et al.*, No. 2024. We ask the Court to consider the opinion of the United States Circuit Court of Appeals for the Tenth Circuit in connection with this Petition for Rehearing, and to amend the Statement of Facts contained in the opinion accordingly. That counsel has not had the benefit of a copy of the opinion of the Circuit Court for the Tenth Circuit at the time of the filing of this petition for rehearing, and asks this Court to consider the same in connection with this Petition for Rehearing.

Conclusion.

In conclusion we submit that the decision of this Court should be changed to be in harmony with *Moore v. Scott, supra,* and *Gross v. Irving Trust Co., supra,* and that this Court should state clearly the time which concurrent jurisdiction exists and terminates between the respective District Courts in bankruptcy in respect to adjudging persons to be bankrupt, and to distinguish between jurisdiction to adjudge a person bankrupt, and jurisdiction to administer his estate, and to entertain other proceedings authorized under Section 2, Subdivisions 1 to 21, of the Bankruptcy Act. That this Court should eliminate the application of *Jones v. Springer* to the case at bar, and should decide definitely whether the proceedings are ancillary or primary.

Respectfully submitted,

FRANCIS B. COBB,
Attorney for Appellant.

Certificate of Counsel.

The undersigned, Francis B. Cobb, counsel for appellant herein, does hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay and is, in my judgment, well founded.

FRANCIS B. COBB.